

3 FAH-1 H-1520

PROCESS FOR DEPARTMENT OF STATE CIVIL SERVICE AND FOREIGN SERVICE EMPLOYEES OR EMPLOYMENT APPLICANTS ALLEGING SEXUAL ORIENTATION DISCRIMINATION

*(CT:POH-112; 06-02-2005)
(Office of Origin: OCR)*

3 FAH-1 H-1521 GENERAL

3 FAH-1 H-1521.1 Purpose

*(CT:POH-112; 06-02-2005)
(State Only)
(Foreign Service and Civil Service Employees)*

This subchapter implements the Department's policy of equal employment opportunity without regard to sexual orientation (including sexual orientation persecution/intimidation and retaliation for opposing discrimination and/or filing or participating in the investigation of a complaint) (3 FAM 1511.1 paragraph a). These procedures are available to *individuals* employed in the Department's *Foreign Service or Civil Service* appointive positions and applicants for such positions, except that non-United States citizens who are employed in, or who apply for, positions located outside the territorial *boundaries* of the United States may not utilize the procedures established by this subchapter.

3 FAH-1 H-1521.2 Policy

*(TL:POH-38; 12-19-1997)
(State Only)
(Foreign Service and Civil Service Employees)*

The Department's objective is to process complaints of discrimination on the basis of sexual orientation to the maximum extent practicable, in a manner consistent with Equal Employment Opportunity Commission (EEOC)

regulations (29 CFR 1614), as modified, clarified, and/or supplemented by these guidelines.

3 FAH-1 H-1521.3 Responsibilities

(CT:POH-112; 06-02-2005)

(State Only)

(Foreign Service and Civil Service Employees)

- a. The *Assistant Secretary for Civil Rights (A/S) should* ensure that complaints of sexual orientation discrimination are processed fairly and promptly.
- b. The *A/S*, or his/her designee, *should* promulgate and interpret procedures for processing complaints of sexual orientation discrimination, and *should* act as the Department's decision-maker with respect to complaints filed under these procedures.
- c. Prior to resolving a complaint filed in accordance with these procedures the *A/S* will assure that the Director General of the Foreign Service (*DG*), the Office of the Legal Adviser (L), and any other appropriate officials are consulted in a finding of discrimination, the development of remedies, and settlement of complaints.

3 FAH-1 H-1521.4 Authorities

(CT:POH-112; 06-02-2005)

(State Only)

(Foreign Service and Civil Service Employees)

- a. The President's explicit request (in his EEO statement dated November 22, 1993) that each Federal agency and Department establish a workplace free from discrimination and harassment, including discrimination and harassment on the basis of sexual orientation.
- b. *The provisions of the Department's Discriminatory Harassment Policy, articulated at 3 FAM 1524, applies by its own terms to harassment on the basis of sexual orientation.*

3 FAH-1 H-1522 COMPLAINT PROCESSING

(CT:POH-112; 06-02-2005)

(State Only)

(Foreign Service and Civil Service Employees)

- a. Since neither the Equal Employment Opportunity Commission nor any other outside agency has appellate jurisdiction over administrative complaints of sexual orientation discrimination, this process shall be completely internal *to the* Department of State. However, for purposes of efficiency and economy, the Department has chosen to incorporate the EEO counseling procedure described in 29 CFR § 1614.105 in this process. *In cases where an employee decides to file a grievance, the Foreign Service Grievance Board should have appellate jurisdiction.*
- b. Sexual orientation discrimination complaints are not *governed by any statutory prohibition or external regulatory process. Remedies authorized under Title VII, such as front pay, interest on back pay, attorney fees, compensatory damages, or any other monetary relief other than back pay, are not available in such cases.*

3 FAH-1 H-1523 EEO COUNSELING STAGE

(CT:POH-112; 06-02-2005)

(State Only)

(Foreign Service and Civil Service Employees)

- a. Aggrieved *individuals* (employees or employment applicants), who believe they have been discriminated against on the basis of sexual orientation, must consult an EEO counselor. The names and locations of such counselors may be obtained from the Department's *Office of Civil Rights (S/OCR) (telephone number 202-647-9295) and are available on its intranet website.*
- b. An aggrieved individual must initiate contact with an EEO Counselor within 45 calendar days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. The *A/S* may extend the 45-day time limit when:
 - The individual shows that *he/she* was not notified of the time limits and was not otherwise aware of them
 - The individual did not know and reasonably should not have known that the discriminatory matter or personnel action occurred
 - Despite due diligence, the individual was prevented by circumstances beyond *his/her* control from contacting a counselor within the time limit

- *For other reasons considered sufficient by the Assistant Secretary and consistent with established EEOC precedent for issues under that agency's jurisdiction*

c. Unless the aggrieved *individual* agrees *either to extend the* counseling period under 3 FAH-1 H-1523 paragraph d, or *elects* alternate dispute resolution procedures *in lieu of traditional counseling, the counselor shall conduct the final interview with the aggrieved individual within 30 calendar days of the date the aggrieved individual brought the matter to the counselor's attention. If the matter has not been resolved, the counselor shall inform the aggrieved person in writing, not later than the thirtieth day after contact, of the following:*

- The right to file a discrimination complaint within 15 days of receipt of the notice *of final interview and right to file*
- *The appropriate official with whom to file a formal complaint of sexual orientation discrimination*
- Complainant's duty to assure that the Department is informed immediately *in writing if the complainant retains counsel or a representative*

d. Prior to the end of the 30-day period, the aggrieved *individual* may agree in writing with the Department to postpone the final interview and extend the counseling period for an additional period of not more than 60 calendar days. If the matter has not been resolved before the conclusion of the agreed extension, *the EEO counselor should issue the notice described in 3 FAH-1 H-1523 paragraph "c".*

e. *Where the aggrieved individual elects to participate in the Department's alternative dispute resolution procedure (ADR), the Department should make every reasonable effort to resolve the matter in dispute or inform the aggrieved individual of its decision not to offer ADR within 90 days of the date of election of ADR. If the matter has not been resolved before the ninetieth day, the notice described in 3 FAH-1 H-1523 paragraph c should be issued.*

f. *The EEO counselor shall not attempt in any way to restrain the aggrieved individual from filing a complaint of sexual orientation discrimination.*

g. *The EEO counselor shall only reveal the identity of an aggrieved individual when the aggrieved individual has explicitly granted the counselor permission to do so, or until the Department has received a formal discrimination complaint from the aggrieved individual involving the same matter, whichever occurs first.*

3 FAH-1 H-1524 COMPLAINT PROCEDURES

3 FAH-1 H-1524.1 Complaint Filing

(CT:POH-112; 06-02-2005)

(State Only)

(Foreign Service and Civil Service Employees)

- a. A complaint must be filed within 15 calendar days of receipt of the notice required by 3 FAH-1 H-1523 paragraphs "c" through "e".
- b. A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.
- c. The Department shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed.

3 FAH-1 H-1524.2 Dismissal of Complaints

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(Foreign Service and Civil Service Employees)

The *A/S* or his/her delegate *should* dismiss a complaint or a portion of a complaint:

- (1) That fails to state a claim of sexual orientation discrimination or states a claim that is pending before or has been decided by the Department;
- (2) That fails to comply with the applicable time limits contained in 3 FAH-1 H-1523 paragraphs b and c, unless the *A/S* extends the time limits for such good cause described in 3 FAH-1 H-1523 paragraph b, or that raises a matter that has not been brought to the attention of a counselor and is not like or related to a matter that has been brought to the attention of a counselor;
- (3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

- (4) Where the complainant has raised the matter in a statutory or negotiated grievance procedure that permits allegations of sexual orientation discrimination (such as the Foreign Service grievance process) or as an affirmative defense in an appeal to the Merit Systems Protection Board;
- (5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step towards taking a personnel action, is discriminatory;
- (6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days of a notice of proposed dismissal sent to his/her last known address;
- (7) Where the Department has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the Department's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated by Final Agency Decision if sufficient information for that purpose is available; or
- (8) *If the complainant refuses an offer of settlement that contains a Department offer of full relief as certified by the Assistant Secretary for Civil Rights within 30 calendar days of receipt, provided that the offer gave notice that failure to accept would result in dismissal of the complaint.*

3 FAH-1 H-1525 INVESTIGATION OF COMPLAINTS

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- a. *The A/S, through EEO investigators authorized by S/OCR to conduct investigations on behalf of that office, shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. The Department may use an exchange of letters or memoranda, interrogatories, affidavits, fact-finding conferences, or any other probative fact-finding methods that efficiently*

and thoroughly address the matters at issue. The A/S shall incorporate alternative dispute resolution techniques in its investigative efforts to promote early resolution of complaints, as the Assistant Secretary deems appropriate.

- b. *Investigators shall adduce documentary and testimonial evidence pertinent to the complaint allegations. Witnesses shall be subject to penalties under 18 U.S.C. 1001 for knowing and willful false statements.*
- c. The complainant, the Department, and any employee of the Department shall produce such documentary and testimonial evidence as the investigator deems necessary.
- d. When the complainant or the Department and its employees fail, without good cause shown, to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness (es), the investigator may note in the investigative record that the decision maker may, in appropriate circumstances:
 - (1) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
 - (2) Consider the matter to which the requested information or testimony pertains to be established in favor of the opposing party;
 - (3) Exclude other evidence offered by the party failing to produce the requested information or witness;
 - (4) Issue a decision fully or partially in favor of the opposing party; or
 - (5) Take such other actions as deemed appropriate.
- e. The *A/S* should make every effort to complete the investigation within 180 days of the date of filing the complaint.
- f. Upon completion of the investigation, the *A/S*, or his/her delegate, *should* notify the complainant that the investigation has been completed and *should* provide the complainant with a copy of the *Report of Investigation*.

3 FAH-1 H-1526 FINAL AGENCY DECISIONS

*(CT:POH-112; 06-02-2005)
(State Only)*

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- a. *The A/S, or his/her delegate, should issue a written decision based upon the investigation and matters of official record and notice. The decision should consist of findings on the merits of each issue in the complaint and, when discrimination is found, should award such appropriate remedies and relief, as the A/S deems appropriate. Such remedies and relief may include:*
 - *Employment offers to applicants*
 - *Promotional relief*
 - *Reassignment*
 - *Cancellation of discriminatory personnel actions*
 - *Expungement of adverse documentation from Department records*
- b. *Such decisions are administratively final and non-reviewable. In cases where the A/S finds discriminatory practices or procedures that should be eliminated, the A/S shall make such a recommendation to the Under Secretary for Management.*

3 FAH-1 H-1527 MULTI-BASIS COMPLAINTS

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In the event a complaint is filed which contains an allegation of discrimination based on sexual orientation and additional bases covered by EEOC regulations, all allegations will be investigated concurrently. However, following the investigation, those allegations not based on sexual orientation will be processed in accordance *with* existing procedures outlined in 29 CFR 1614, and the *A/S* will determine whether to proceed with a final decision regarding the sexual orientation allegation or to defer action on the sexual orientation allegation until the 29 CFR 1614 procedures are exhausted.

3 FAH-1 H-1529 MATTERS OF GENERAL APPLICABILITY

3 FAH-1 H-1529.1 Consensual Settlement

Encouraged

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The *A/S* should make all reasonable efforts to settle voluntarily complaints of sexual orientation discrimination as early as possible in, and throughout, the administrative processing of the complaints, including the pre-complaint counseling stage. Any settlement reached *should* be reduced to writing and signed by both parties, and *should* identify the allegations resolved.

3 FAH-1 H-1529.2 Representation and Official Time

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All provisions regarding representation and reasonable time contained in 3 FAH-1 H-1514 applies to complaints under this subchapter.

3 FAH-1 H-1529.3 Disqualification of Representative

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In cases where the representation of a complainant would conflict with the official or collateral duties of the representative, the *A/S* may, after giving the representative an opportunity to respond, disqualify the representative.

3 FAH-1 H-1529.4 Official Correspondence with Representative

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- a. Unless the complainant states otherwise in writing, after the *A/S* has received written notice of the name, address, and telephone number of a non-attorney representative for the complainant, all official correspondence *from the Department on the subject of the pending complaint of discrimination should be with the representative, with copies*

to the complainant.

- b. When the complainant designates an attorney as representative, service of documents and decisions on the *complaint should* be made on the attorney and not on the complainant. *The attorney should compute time frames for receipt of materials by the complainant from the time of the attorney's receipt.*
- c. The complainant must serve all official correspondence on the designated representative of the Department.

3 FAH-1 H-1529.5 Complainant Responsibility

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The complainant *should*, at all times be responsible for proceeding with the complaint, whether or not he/she has designated a representative.

3 FAH-1 H-1529.6 Official Time for Witnesses

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Witnesses who are Department employees, regardless of their tours of duty, *should* be in a duty status when their presence is authorized or required by Department officials and/or an investigator in connection with the processing of a *complaint of discrimination*.